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SUPREME COURT, U.S.

NO. 82-5353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MICHAEL EDWARD PINCH,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-5353

MICHAEL EDWARD PINCH,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules, the State of North Carolina responds to the petition of Michael Edward Pinch and requests that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

Michael Edward Pinch was tried, convicted, and sentenced to death in the Superior Court of Guilford County. In an opinion reported in State v. Pinch, ____ N.C. ____, 292 S.E.2d 203 (1982), the Supreme Court of North Carolina found no error in the conviction and affirmed the sentence of death.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. WAS THE EXCUSAL FOR CAUSE OF POTENTIAL JURORS MARY NEAL AND FRANK ROGERS A VIOLATION OF THE RULE ENUNCIATED IN WITHERSPOON v. ILLINOIS, 391 U.S. 510 (1968), THEREBY INVALIDATING THE PETITIONER'S DEATH SENTENCE?

II. WAS THE DEATH SENTENCE IN THIS CASE IMPOSED WITHOUT CONSIDERATION OF RELEVANT MITIGATING FACTORS IN VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978), WHEN THE TRIAL COURT EXCLUDED IRRELEVANT, REPETITIOUS, AND UNRELIABLE EVIDENCE?

III. SHOULD THIS COURT REVIEW THE SUPREME COURT OF NORTH CAROLINA'S INTERPRETATION OF STATE LAW WHICH IS CORRECT AS A MATTER OF FEDERAL CONSTITUTIONAL LAW?

STATEMENT OF THE CASE

On January 29, 1980, Michael Pinch, a fugitive from North Carolina, was arrested in Anaheim, California for the murders of Tommy Dale Ausley and Freddie Eli Pachaco on October 18, 1979. His confederates, Jimmy Eanes, Billy Wayne Stanley, Leslie Hearl Stanley, Terry Brogden, Shawn Feeney, and Keith Way had previously been arrested for first degree murder or accessory after the fact to murder.

On February 4, 1980, Pinch was indicted for two counts of first degree murder by the Guilford County Grand Jury. (R. 3-4) On August 25, 1980, Michael Edward Pinch was brought to trial on both cases, which had been joined for trial at Pinch's request. (R. 14) Hearings were held prior to jury selection on, among other things, petitioner's motion filed August 28, 1980 that the District Attorney be required to allow defense counsel's medical expert access to the State's witnesses. This motion was denied by the trial court on September 2, 1980 (R. 47).

The State presented evidence showing the following:

On October 16, 1979, the defendant, Michael Pinch, who was also known as "Tennessee", was walking around in Greensboro, North Carolina with Jimmy Eanes, a friend, when they ran into Freddie Eli Pachaco, also known as "Rabbit". (R. 215). Pinch disliked "Rabbit" due to his having seen a girlfriend of Pinch's and due to his having worn "colors", (motorcycle gang insignia) to which he was not entitled. (R. 145) Pinch told Eanes he hated that punk (Pachaco) and wanted to fight him. Pinch thought they would fight, but Pachaco was conciliatory and offered him some marijuana. The group then went to a trailer where they smoked marijuana and drank beer. Pachaco asked Pinch if Pinch were after him. Pinch stated, "I think you're a punk and if I was going to kick your ass, I would have already done it." (R. 215).

The next day, at Gloria Ricker's trailer, where Pinch apparently lived (R. 106, 131), Pinch, Jimmy Eanes, Shawn Feeney, Keith Way, Billy Wayne Stanley and Leslie Pearl (Stanley) got together to drink beer and listen to music. The atmosphere was calm and pleasant, with everyone apparently having a good time and getting along (R. 106, 116, 145). Freddie Pachaco and a friend of his, Tommy Ausley, unexpectedly came over, bought a case and a half of beer, and joined the party. As the evening wore on, Pinch told several of his friends of his continuing dislike for Pachaco (R. 107, 132, 141, 145) and that he would kill him. During the evening, Pinch took Shawn Feeney's shotgun and shot it at a clothesline (R. 107, 119, 144, 147). A sheriff's deputy came to the trailer after the shooting and spoke to Pinch, who denied doing any shooting. The deputy then left.

Pinch left Gloria's trailer around 10:00 p.m. and returned with Bobby Smith's loaded sixteen gauge shotgun which he borrowed from Bobby Smith's girlfriend, Lynn Marie Taylor

(R. 120). He told her he wanted to scare someone with it.

Pinch then suggested that everyone go to the Stoker Motocycle Club's clubhouse which was located in the woods off Wendover Avenue in Greensboro (R. 107, 116-117, 132, 141, 145). He got Jimmy Eanes to ride with Pachaco and Ausley to make certain that Pachaco and Ausley got to the clubhouse (R. 132, 170). Keith Way drove Pinch and Shawn Feeney to the clubhouse. On the way to the clubhouse, Pinch stated to Way and Feeney that he intended to kill Pachaco and Ausley (R. 107, 117, 215-217) after Keith Way had asked him why he had the shotgun. Way and Feeney told Pinch that he shouldn't do that. (R. 217).

When they got to the clubhouse, Michael Pinch opened the door and Way, Pachaco, Ausley, Feeney, and Eanes went in and began playing foozeball (R. 108, 117, 132). Michael Pinch sat behind the bar with the shotgun on his lap, saying nothing. (R. 108, 117, 132). Leslie Hearl and Billy Wayne Stanley looked at a photograph album and then went into an adjacent room. (R. 141, 145).

Sometime that evening Pinch instructed Jimmy Eanes, his best friend, to cut Pachaco's jugular vein; that he, Pinch, would back him up (R. 217, 172-173). He gave Eanes his knife. Eanes, in fact, did cut Pachaco on the throat. Pachaco looked confused and got emotional, but did not fight back (R. 108, 117, 133, 141, 145). Ausley started to come over to help Pachaco and was confronted by Eanes who threw a chair at him. Things calmed down briefly according to Eanes (R. 133). Feeney and Way went outside the clubhouse (R. 108, 117).

At sometime between five to twenty minutes after Eanes slashed Pachaco on the neck (R. 217, but see R. 133), Michael Pinch raised the shotgun at Pachaco and pointed it at him.

Pachaco told the defendant "I will go down laughing." Without replying, Pinch shot Pachaco in the chest (R. 133, 142, 173, 217). He then turned the shotgun on Ausley, a person he had never seen before that day (R. 172). Ausley begged "No, no not me" or "No, it's cool. Not me," (R. 133, 173) and put his hands up. Pinch calmly cleared the chamber of the shotgun on an empty shell stuck there and then shot Ausley through the neck (R. 217, 165, 173, 133, 142). Pinch was told that "Rabbit" was still moaning, so he walked over to Pachaco as he lay helpless on the floor and shot him again at point blank range just below the heart (R. 133-134, 142, 173, 217). During these shootings, Michael Pinch had a "sort of grin" on his face (R. 142).

After he killed Pachaco and Ausley, Pinch walked out to the porch of the clubhouse and informed Feeney and Way that he'd just blown away two dudes (R. 108, 134, 142, 174).

Pinch then directed everyone to help him dispose of the bodies. Pinch and his cohorts got the bodies into the green automobile (R. 109, 117, 134, 174, 217) and then Eanes and Stanley were directed to dump the bodies (R. 109, 117, 134, 142, 174, 217). Jimmy Eanes drove the automobile with the bodies over to Causey Street where he abandoned the car in a ditch (R. 110-111, 117, 119, 134). After supervising the dumping of the bodies, Pinch went with Leslie Hearl and Billy Wayne Stanley to Leslie's father's home (R. 143, 146, 175). On the way to the Hearl residence he told Billy Wayne Stanley that he had killed Pachaco and Ausley because he had no use for people like that. Jimmy Eanes took the shotgun back to Bobby Smith (R. 134, 140). In response to questions by other friends about why he had killed the two men, Pinch stated he was a one percenter and Pachaco wasn't; that he had no regrets. He described to Terry Brogden how the blood had gurgled out of the bodies (R. 149), and told him that they (Pachaco and Ausley) had it coming to them (R. 149).

Pinch directed Billy Wayne Stanley and Leslie Hearl to clean the blood up from the clubhouse floor, which they did (R. 143, 146). Terry Brogden, another Stroker Club member, painted the floor to hide the bloodstains. (R. 148).

The next night, Pinch attended a party at the clubhouse (R. 176-177).

Meanwhile, the bloody car and its grisly contents had been found by Robert Carter, who lived near where the car had been abandoned (R. 103-104). Michael Pinch saw a news-clip of the automobile and discovered the police had found fingerprints. He prudently left for California about three weeks after the killing after hiding in the woods near Shawn Feeney's home (R. 178) where he was later arrested, waived extradition, and confessed.

The pathologist who examined the bodies of Ausley and Pachaco stated they died of gunshot wounds and had blood alcohol levels of .12 (Ausley) and .15 (Pachaco at the time of their deaths.

The defense presented evidence by way of cross examination that Pinch was drunk when the killings occurred. The jury returned a verdict of guilty of first degree murder in both cases.

During the sentencing phase of the trial the State generally relief on the evidence produced at the guilt phase of the trial, although Officer L. G. Fuller of the Greensboro Police Department did testify as a rebuttal witness concerning Pinch's admissions that he had an affair with Sherry Olivey (R. 300).

The defense during sentencing presented evidence from Michael Pinch, Dr. Billy Royal, Sherry Olivey, Linda Pinch, Louise Nixon, and Dr. Allen Sherrow.

Michael Pinch put on evidence that he was nineteen when he gunned down Pachaco and Ausley (who were eighteen and nineteen years old) (R. 246) and that he had been more or less living on his own for periods of time after he was thirteen. His family life had been chaotic due to his father's leaving his mother, his mother's having to work, and then his mother's marriage to a bisexual. He had been drinking heavily (a couple of six packs of beer a day) and taking drugs since he was fourteen years old (R. 278). He stated he did not regret killing Freddie Pachaco at the time, and did not regret killing him at the time he was arrested two months later (R. 279), but that he regretted killing Pachaco now. He stated when he killed the two men, he had drunk a case of beer and was drunk. He would only have fought them if he had been sober (R. 278). He told that he changed his thinking after going to jail and getting away from drugs and alcohol (R. 279). Dr. Billy Royal, a forensic psychiatrist at the State Mental Hospital testified that Michael Pinch had liver damage from apparent heavy drinking (R. 283). He gave Michael psychological tests and did studies as well as an intelligence test and a reading test. He testified that while Pinch scored lower than average on the intelligence test (66), his other tests indicated that his I.Q. was probably a little higher than that and fell at least into the low-normal range of intelligence.[1] He also stated that Michael Pinch had chronic depression due to an unfavorable view of himself (R. 284). On cross examination, he clarified that the depression was mild, and caused in part by his incarceration and facing two charges of first degree murder. He did not find any evidence in Pinch

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[1]In fact, Dr. Royall's report (at R. 29-30) indicates Pinch scored a 9.6 on the reading test, which puts him in the normal range of intelligence.

of the anger usually found in people of these (motorcycle gan, apparently) subculture groups. (R. 286). When he interviewed Pinch [sometime between June 2 and June 27, 1980 (R. 282)], Pinch had no particular regret over killing Pachaco, though he did feel remorse over Ausley (R. 285).

Sherry Olivey, a close friend of Pinch, testifed that Pinch lived with her and her husband for nearly a year and that they were close. She observed him use large amounts of drugs and alcohol. He was not a social drinker, but rather "went to the max" on everything to where he couldn't walk anymore or passed out, and she had seen him take alcohol or drugs to the point to where he was unconscious or in some state like that (R. 287). She was allowed to testify that he overdosed on drugs on several occasions (R. 287), but was not allowed to testify as to the particular occasions (R. 287).

Linda Pinch, Michael's sister, testified that she had received many letters from Michael and had many conversations with him and he had told her his remorse for the killings (R. 289).

Louise Nixon, Pinch's mother, testifiedas to her marital problems, and the problems Michael had growing up. She testified that she heard nothing from Pinch from when he moved from his brother's home in Greensboro (beginning of 1979) until February 12, 1980 when she learned of his arrest. She immediately went to see Michael in jail and since then has constantly been in touch with him. She received up to sixteen letters from him in which he told her of his attitude about the killings and that he regretted the killings and would not repeat those acts if he had it to do over (R. 292). Mrs. Nixon was allowed to read portions of the letters to the jury, and also a poem describing his growing awareness of the goodness of his family, his love for them, and his

desire to change his life and his new maturity and his desire to benefit society. (R. 298). The portions of the letters dealt with his regret for the killing, his living for the future and his "cleaning up his act" and getting along with people (R. 298). Mrs. Nixon was not allowed to read several letters or the entire portions of some letters introduced in evidence.

The material excluded by the judge included a letter in which Pinch discussed learning a trade in prison so he could work when he got out (App. D. 9), that he was tainted by his father's blood, that he hoped he could get out of prison before his mother died so he could make up to her the wrong he had done her, that his new cell was cleaner than the last, that he wanted his mother to tell him why he was bad and the other children were good (App. D. 10).

Dr. Sherrow testified as a defense expert in alcohol and drug addiction concerning Pinch's condition at the time of the killing. He stated Pinch told him of drinking one half to a full case of beer per day prior to his incarceration (R. 293). He was told how much alcohol Pinch thought he had ingested on the day of the killings. However, he had been unable to determine the exact amount of alcohol that Pinch consumed since he had not spoken to the eyewitnesses about that and about Pinch's behavoir during the relevant period (R. 293).[2] Due to Dr. Sherrow's lack of knowledge concerning the other accounts of the defendant's alcohol consumption and behavoir, he could not, to a degree of medical certainty, give an opinion as to whether or not Pinch was affected by consumption of alcohol during the time he killed Ausley and

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[2]It should be noted this testimony came <u>after</u> all these witnesses had testified and had been cross examined by counsel for the defendant on precisely these issues.

Pachaco. (R. 293-294). The court would not allow the Doctor to speculate since he did not hold an opinion to a reasonable degree of medical certainty (R. 296).

After the presentation of his evidence, and arguments of counsel, the court instructed the jury. The jury found in both cases two aggravating circumstances existed beyond a reasonable doubt (R. 341, 344); the jury found beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty (R. 342, 344), and that the mitigating circumstances found did not outweigh the circumstances in aggravation, thus requiring sentences of death.

Defendant gave notice of appeal from the convictions and judgments of death, which convictions and judgments were affirmed by the Supreme Court of North Carolina on June 2, 1982.

REASONS FOR NOT GRANTING THE WRIT

I. THE EXCUSAL FOR CAUSE OF PROSPECTIVE JURORS, MARY NEAL AND FRANK ROGERS, DID NOT VIOLATE THE RULE ENUNCIATED IN WITHERSPOON v ILLINOIS, 391 US 510 (1968), BECAUSE THEIR ANSWERS ON VOIR DIRE CONCERNING THEIR ATTITUDES TOWARD THE DEATH PENALTY, WHEN CONSIDERED CONTEXTUALLY, SHOW THAT EACH WAS IRREVOCABLY COMMITTED BEFORE THE TRIAL BEGAN TO VOTE AGAINST THE DEATH PENALTY REGARDLESS OF WHAT THE FACTS AND CIRCUMSTANCES MIGHT PROVE TO BE FROM THE EVIDENCE ADDUCED AT TRIAL.

The holdings in Witherspoon v Illinois, 391 US 510 (1968) and its progeny are straightforward. A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. However, a State is not prohibited from excluding for cause veniremen who made it unmistakably clear that they would automatically vote against capital punishment without regard to any evidence that might be developed at trial. 391 US at 522-523. Improper excusal for cause on Witherspoon grounds of but one venireman will invalidate the death sentence. Davis v. Georgia, 429 US 122 (1976). The essence of the Witherspoon rule is that a prospective juror may not be challenged for cause based upon his or her views about capital punishment unless those views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions and oath. A State may constitutionally insist that a juror will consider and decide the facts of a case impartially and conscientiously apply the law as charged by the court. Adams v. Texas, 448 US 38 (1980). Potential jurors cannot be disqualified for cause because the possibility of the death penalty might affect their deliberations on any issue of fact. Id.

There is no question that the Supreme Court of North Carolina recognizes Witherspoon and its progency as the law of the land. In footnote 3 of his petition for this writ, the petitioner catelogued numerous cases wherein Witherspoon issues were raised on appeal and considered by the Supreme Court of North Carolina.

The petitioner challenges the Supreme Court of North Carolina's interpretation of Witherspoon in the context of prospective juror's responses to Witherspoon questions which appear to be equivocal when taken out of context. Petitioner asserts that the answers of prospective juror Mary Neal failed to demonstrate that she was irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances which might emerge at trial because she responded "I don't believe so" and "No, I just don't think so" to some of the Witherspoon questions propounded to her. Taking a somewhat different tack, petitioner asserts that prospective juror Frank Rogers was improperly excluded for cause on Witherspoon grounds because the trial judge failed to make sufficient inquiry to determine whether Rogers would be unequivocably or irrevocably opposed to consideration of the death penalty despite evidence which might be introduced at trial. Citing State v. Avery, 299 NC 126, 261 SE 2d 802 (1979), the Supreme Court of North Carolina rejected these contentions after considering Mrs. Neal's and Mr. Rogers' responses in the context of their entire voir dire examinations on these points. State v. Pinch, ____ NC ____, 292 SE 2d 203, 213 (1982).

Apparently the petitioner believes that any equivocation on the part of a prospective juror who was successfully challenged for cause on Witherspoon grounds equates to a violation of the Witherspoon rule thereby invalidating the death sentence. The Supreme Court of North Carolina takes a pragmatic common sense approach to Witherspoon issues. It reviews the entire jury selection voir dire of a prospective juror, as it relates to the Witherspoon issue, in order to ascertain whether the prospective juror had in fact clearly and unmistakably conveyed his or her irrevocable commitment to vote against the death penalty (regardless of the evidence presented) even though some of the prospective jurors' responses were phrased "I don't believe so," or "No, I just don't think so." If the totality of the voir dire responses to Witherspoon questions leads unmistakably to the conclusion that the prospective juror would automatically vote

against capital punishment without regard to any evidence which might be developed at trial, then the substance of this predisposition prevails over the form of the answer. This approach is rational, reasonable, and does not violate the Witherspoon rule. This interpretation permits the State to constitutionally cull from the jury those prospective jurors whose views on capital punishment would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath as they relate to capital punishment.

The issue raised by the petitioner is not a new one. It was also raised in State v. Barfield, 298 NC 306, 259 SE 2d 510 (1979), cert. denied 448 US 907 (1980), rehearing denied 448 US 918 (1980), cert. denied 102 S.Ct. 494 (1981), rehearing denied 102 S.Ct. 693 (1981), habeas corpus petition dismissed sub nom. Barfield v. Harris, 540 F.Supp. 451 (E.D.N.C. 1982). This was one of the points raised in Barfield's petition for writ of certiorari which this Court denied [448 US 907 (1980)].

Very recently, Chief District Court Judge Dupree analyzed this issue when it was raised by Barfield by way of a habeas corpus petition. Barfield v. Harris, supra. The following excerpt from Judge Dupree's Memorandum of Decision and Order captures the essence of the issue:

> Petitioner contends that Mr. Dent's exclusion violated Witherspoon because he never stated unequivocally that he could not vote for the death penalty under any circumstance. In support of this contention petitioner correctly notes that the exclusion of even one prospective juror in violation of the Witherspoon standard invalidates a subsequent sentence of death, regardless of whether the state went to trial with peremptory challenges unexercised. Davis v. Georgia, 429 US 122, 97 S.Ct. 399, 50 L.Ed. 2d 339 (1976); Moore v. Estelle, 670 F. 2d 56 (5th Cir. 1982); Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), adopted en banc, 626 F.2d 396 (5th Cir. 1980). That the relevant statements by the prospective juror must be completely unequivocal has been recently reaffirmed by the Fifth Circuit in Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981). There a prospective juror
>
> > "was first asked whether he had conscientious scruples against the infliction of the death penalty whereupon he stated, 'I don't know what that means.' When asked if he could ever vote to inflict the death penalty, he replied, 'No, I don't think I could.' Then, in response to the question, 'You just don't feel like you would be entitled to take another person's life in that fashion?' He nodded and then said, 'No, I could not.'" Id. at 677.

The Fifth Circuit held that "[t]hese questions and answers fall far short of an affirmation by [the prospective juror] that he would automatically vote against the death penalty regardless of the evidence," thus invalidating the death sentence. Id. See also Alderman v. Austin, 498 F.Supp. 1134 (S.D. Ga. 1980); State v. Johnson, 298 NC 355, 366, 259 SE 2d 752 (1979) (Johnson II).

Petitioner contends that any time a prospective juror states that he "believes" or "thinks" or "feels" that he could not vote to impose the death penalty, rather than stating absolutely that he could not, the juror may not be excluded under Witherspoon. The precise words used by the juror, however, are not dispositive. Burns and Granviel turn instead on the perfunctory nature of the voir dire examination and on the fact that the questions were directed at whether the responsibility to recommend life or death would "affect" their deliberations as juror. In contrast, Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981), the court held that there was no Witherspoon violation where a prospective juror, in response to a question as to whether he would be unwilling to return a recommendation of death, had answered, "I believe I would," Id. at 960. The court rejected the contention that this response was ambiguous and held that "the hard question was asked, repeatedly and without deviation from the minimal requirements of Witherspoon." Id. at 962. Similarly, in McCorquodale v. Balkcom, 525 F.Supp. 408 (N.D. Ga. 1981), appeal pending, the court found that initial equivocation during voir dire examination was not fatal when the prospective jurors ultimately did make it unmistakably clear that they could not vote for the death penalty. The court assessed the "bottom line" rather than search the entire voir dire for signs of equivocation. Id. at 425. "The trial judge often must make judgments as to whether or not a prospective juror really means it when he says something. This Court believes some deference is due the judgment of the trial judge, who heard these two jurors as they stated that their reconsidered positions were that they could not impose the death penalty under any circumstances." Id. See also Mason v. Balkcom, 487 F.Supp. 554, 560 (M.D. Ga. 1980), reversed on other grounds, 669 F.2d 222 (5th Cir. 1982); Douglas v. Wainwright, 521 F. Supp. 790, 796-800 (M.D. Fla. 1981).

The court views the examination of Mr. Dent in the same light. Although he certainly equivocated during the voir dire, he stated several times that under no circumstances could he vote to recommend the death sentence. The trial judge was actively involved in the examination and carefully phrased the "hard" question. He apparently believes that Mr. Dent's opinion, ultimately was unequivocal. This court agrees and therefore holds that there was no Witherspoon violation in the exclusion of Mr. Dent. Indeed, in view of Mr. Dent's many statements that he could not under any circumstances vote to impose the death penalty, denying the motion to excuse him for cause might well have been error. 540 F. Supp. 451, at 464-466.

As Judge Dupree made clear, there is no Witherspoon infirmity for a court to focus on the "bottom line" after examining

the voir dire in question, rather than to merely search for signs of any equivocation. A trial judge sees and hears the answers given by a prospective juror. He or she is uniquely situated to see the demeanor of prospective jurors, to evaluate their behavior, and to assess the nuances and intangibles that elude capture on the written page of a transcript or record on appeal. A trial judge's interpretation of some seemingly equivocal responses should not be lightly disregarded as long as the "bottom line" unmistakably leads to the conclusion that the prospective juror would vote against capital punishment regardless of evidence which might be developed at trial.

Turning specifically to the jury selection voir dire of Mary Neal and Frank Rogers, it is the State's contention that the Supreme Court of North Carolina's interpretation of Witherspoon in this petitioner's case was correct. During her voir dire examination, the following occurred:

> Q. [By prosecutor] As a juror, can you envision a situation where you would impose the death penalty, you're not going to be an eyewitness, you're going to have to act on what other people tell you they saw or heard.
>
> A. [By Mrs. Neal] Okay, already proven guilty -- if I went along with the guilty part, if I decided they were guilty -- no, I will not.
>
> Q. You could not impose the death penalty regardless of what the evidence is?
>
> A. I don't believe so. (Emphasis added, Rpp 100-101).

Upon further Witherspoon questioning by the trial judge, Mrs. Neal stated that, "No, I just don't think so." Reading Mrs. Neal's responses in context, the "bottom line" is that she clearly expressed sufficient refusal to follow the law just as the Supreme Court of North Carolina concluded. State v. Pinch, 292 SE 2d at 213. There is no Witherspoon error here.

After questioning of Mr. Rogers by the prosecutor and trial judge, the following took place:

> THE COURT: Mr. Juror, are you saying that before you have heard any evidence in this case, Mr. Rogers, if the defendant should be found guilty of either charge of murder in the first degree, without hearing any evidence, that under no circumstances would you return a verdict which would result in the imposition of the death penalty?

Mr. Rogers: That is true. (Rpp 67-68).

Mr. Rogers' responses clearly, unmistakably, and unequivocally convey the message that he would not vote for capital punishment under any circumstances. His responses goes far beyond being a "life-prone" juror, as the petitioner contends. Read contextually with a grain of common sense, it is clear that he expressed sufficient refusal to follow the law relating to capital punishment and was properly excluded for cause. There is no Witherspoon error here either.

In summary, both Mrs. Neal and Mr. Rogers excusals for cause did not violate the rule enunciated in Witherspoon. Their responses to questions propounded to them on voir dire concerning their attitudes toward the death penalty, when considered contextually, show that each was irrevocably committed before the trial began to vote against the death penalty regardless of what the facts and circumstances might prove to be from the evidence adduced at trial. For these reasons, this Court should not grant the petitioner the writ he seeks.

In addition, the State also believes that review of this case at this time on this issue would be premature. Barfield v. Harris, supra, is currently pending in the Fourth Circuit Court of Appeals. The decision of the Fourth Circuit will more fully develop and clarify this issue and could obviate the need for this Court to review this issue.

II. THE DEATH SENTENCE IN THIS CASE WAS NOT IMPOSED WITHOUT CONSIDERATION OF RELEVANT MITIGATING FACTORS IN VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978) WHEN THE TRIAL COURT EXCLUDED IRRELEVANT, REPETITIOUS, AND UNRELIABLE EVIDENCE.

As the second part of his request that this Court grant certiorari, Michael Pinch argues that certain rulings in the sentencing phase of his case impermissibly limited jury consideration of mitigating circumstances in ways inconsistent with this Court's decisions in Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, supra; Green v. Georgia, 442 U.S. 95 (1979); and Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982). However, this argument is simply not borne out by the record in this matter now before the Court. Woodson, Lockett, Eddings, and Green hold basically that, as stated in Lockett v. Ohio, supra, at page 604:

> "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis added)

These cases do not hold that the state must nullify all of its traditional rules of evidence dealing with relevancy, repetition, and reliability for a sentencing hearing. Nor do these cases set out how the mitigating factors must be identified for the jury.

The petitioner has divided his argument into the subcategories of mental development, positive qualities of his family relationships, mens rea, and remorse for his crimes. He also suggests the harmless error rules adopted by the Supreme Court of North Carolina in dealing with perceived errors in the sentencing hearing do not comport with Federal constitutional law. Despite the exotic subcategories constructed by Pinch, he is really arguing two things:

(1) that the North Carolina Supreme Court erred as a matter of constitutional law in holding that the evidence before the trial jury during sentencing was not sufficient to require that the trial court, pursuant to G.S. 15A-2000(b), give specific instructions on the probable existence of certain statutory and nonstatutory mitigating circumstances and (2) that the defendant's right to be free from cruel and unusual punishment was denied by the trial court's refusing to allow into evidence things deemed repetitious, irrelevant, and unreliable according to state evidentiary rules.

(1) SUBMISSION TO THE JURY OF SPECIFIC MITIGATING CIRCUMSTANCES.

Lockett and its progeny hold that the sentencer cannot limit what factors the jury may consider in mitigation; it does not set requirements as to how these factors are presented to the jury. In North Carolina, by statute, the judge must include "in his instruction to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from lists provided in subsections (e) and (f) which may be supported by the evidence and shall furnish the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances": G.S. 15A-2000(b). The Supreme Court of North Carolina has held that nonstatutory factors which may be considered by the jury pursuant to the "catchall" mitigating circumstance contained in G.S. 15A-2000(f)(9)[3] must be specifically instructed upon if a timely request is made for the specific instruction and the evidence supports such

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[3]G.S. §15A-2000(f)(9) reads as follows: "(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value."

an instruction: State v. Johnson, 298 N.C. 47, 259 S.E. 2d 752 (1979). The Court has also held, as a matter of state law, that the court should instruct sua sponte on the statutory mitigating circumstances [G.S. 15A-2000(f)(1) - G.S. 15A-2000(f)(8)] when the defendant, who has the burden of persuasion, brings forward sufficient evidence of the existence of the circumstance. State v. Pinch, supra; State v. Hutchins, 303 N.C. 321, 279 S.E. 2d 249 (1981).

Pinch characterizes the trial court's failure to charge specifically on the possible mitigating circumstances of Pinch's allegedly low mentality and alleged emotional problems during the time of the offenses as limiting the jury's full consideration of relevant mitigating factors in violation of Lockett v. Ohio, supra. In fact, the trial court in no way limited the factors the jury could consider in mitigation. All the evidence which Pinch claims supports specific instructions not given by the trial court was before the jury and the trial court allowed the defense counsel to argue to the jury the mitigating aspects of low mentality (R. 310-321) and emotional or mental disturbance at the time of the crime. While as a matter of state law, it is good procedure to charge the jury specifically on how various statutory and nonstatutory mitigating circumstances may be supported by the evidence in the case, it is not a constitutional requirement. Neither Texas nor Florida, both of whose statutes have been declared constitutional by this Court, require such specificity in the sentencing charge. In Florida the list of mitigating circumstances set out in the Florida statute is read to the jury and the jury is further told it may consider any other factor it deems mitigating. There is no specification by the Court about what factors in mitigation either of a statutory or a nonstatutory nature are shown by the evidence presented: 2nd Ed., Florida

Standard Jury Instructions in Criminal Cases, §2.09 (October, 1981). In Texas, there is no list of mitigating circumstances charged to the jury. The jury is simply told in evaluating each of the special issues, the jury may consider all the evidence admitted during the trial and sentencing hearing. See, for instance, Jurek v. Texas, 428 U.S. 262 (1976), or the record in Barefoot v. State, 596 S.W.2d 875 (Tex. Cr. App. 1975), cert. denied, 453 U.S. 913 (1981). This very issue was presented for review before the United States District Court for the Eastern District of North Carolina in Barfield v. Harris, supra (appeal pending). Judge Dupree, in denying a contention that Barfield's death penalty was invalid because the trial judge failed specifically to elaborate on various plausible nonstatutory mitigating circumstances stated, citing Lockett v. Ohio, supra, and Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981): "There was no constitutional violation because the jury was not precluded from considering nonstatutory mitigating factors." Here, too, the jury was not precluded from considering any factors which it might deem mitigating.

Even assuming that there were some Federal constitutional right possessed by Pinch to have the judge specify to the sentencing jury that certain evidence may support a certain specific circumstance the jury may find mitigating, the facts fail to show that the judge erred in not charging specifically upon the two possible mitigating circumstances that the defendant had a relatively low mentality and that the defendant committed the crimes while suffering from an emotional or mental disturbance. The evidence concerning Pinch's mental abilities was that while he scored low on the intelligence quota test (66), other tests showed Pinch's

I.Q. to be probably a little higher and fell at least in the low-normal range of intelligence.[4] This evidence fails to support a charge that the defendant had a relatively low mentality. Likewise, evidence that the defendant suffered from mild, chronic depression, some of which was induced by incarceration, does not support a specific instruction that there was evidence that the capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

The trial court correctly refused to give the two specific charges under state law because there was insufficient evidence to support such charges. Even if there were enough evidence to support the desired charges, the resultant error was not constitutional in nature since the jury was not precluded from examining that evidence: Lockett v. Ohio, supra; Barfield v. Harris, supra.

(2) EXCLUSION OF CERTAIN EVIDENCE.

As the second prong of this argument that certiorari should issue, Pinch alleged that the trial court excluded evidence which would have cast light on his mens rea at the time of the offense, his character, and his remorse for his crimes, thus denying him a right to a hearing in which his uniqueness and character could be explored. See Woodson v. North Carolina, supra; Eddings v. Oklahoma, supra. Again, these contentions are not borne out by the facts.

The Supreme Court of North Carolina has emphasized since the first cases involving the post-Woodson death penalty statute that the evidence standards in sentencing hearings should be relaxed and all relevant evidence - evidence bearing on any aspect of the defendant's character, record, or a circumstance of the offense - should not be excluded.

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[4]The record reflects, in fact, that Pinch's reading test score showed him to be of normal intelligence (R. 30). Likewise, his letters reproduced at Appendix D6-D11 hardly show a feeble mind.

State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). However, such hearings do not nullify the usual rules of evidence, though they should be applied with more flexibility. State v. Pinch, supra. As the Court noted in Pinch:

> "This does not mean that evidentiary rules which normally apply at the guilt phase of the trial should also apply with equal force in the sentencing phase. Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. See Williams v. New York, 337 U.S. 241...(1949). However, as in any proceeding, evidence offered at sentencing must be pertinent and dependable, and, if it passes this test it should not ordinarily be excluded. G.S. 15A-2000(a)(3), supra; see Green v. Georgia, 442 U.S. 95...(1979)."

This standard for evidence in no way violates a defendant's rights under the Eighth and Fourteenth Amendments as a principle, or under the facts of the case before this Court.

In the present matter, a medical expert on alcohol and drug abuse was not permitted to speculate about the degree of Pinch's intoxication at the time of the murders. While such evidence would be pertinent, it simply was not reliable, as the North Carolina Supreme Court correctly recognized. Pinch suggests that the doctor's speculation should be allowed in evidence notwithstanding its lack of reliability because the doctor could not interview witnesses who might have cast some further light on the subject. However, the doctor, had he desired, could have been amply educated on the testimony of the other eyewitnesses concerning Pinch's condition and consumption of alcohol either by sitting through the court proceedings or by being briefed by trial counsel. See State v. Pinch, supra, at pp. 214-215. Reliability, as well as pertinency, must be a paramount concern in the admission of evidence at a sentencing hearing. See Green v. Georgia, supra. Reliability was not met as to this evidence, based as it was solely on self serving statements by Pinch. Therefore, there was no constitutional

violation in its exclusion pursuant to state evidentiary rules. Green v. Georgia, supra; Chambers v. Mississippi, 410 U.S. 284 (1972).

The petitioner also complains that some of his letters were excluded from evidence. In these letters he pondered why he turned out wrong and wondered if he was bad because he was tainted with his father's blood (Appendix D9); he told his mother of his love for her and his realization that he had been ungrateful for her efforts in bringing him up properly; he talked of learning a skill for when he got out of prison; and that he was sorry he had hurt her (his mother). This evidence is relevant, according to petitioner, because it brings out his human qualities.

While the cases both from this Court and the Supreme Court of North Carolina hold the concept of relevancy should be broadened in sentencing hearings, there is a point beyond which even in sentencing hearings the theory of what is relevant cannot be stretched. Rambling dialogue about tainted blood is irrelevant. Telling one's mother one is sorry to have hurt her is, at best, only tangentially connected to considerations of character. Talking about being out of prison soon has no relevant to character or any other aspect of mitigation and, if anything, would be prejudicial to the defendant since jurors apparently worry about parole eligibility when making life or death sentencing decisions. See State v. Cherry, supra, at p. 100. Even assuming the portions of the excluded letters were in any way relevant, the matter excluded was unduly repetitive and so properly excluded by the trial court. For, despite his assertions to the contrary, evidence of his new and blossoming relationship with his family was introduced through his sister's and mother's testimony as well as his poem. Evidence that Pinch had matured, regretted his actions,

and had reevaluated his life was also admitted. In fact, everything excluded in the letters except the comments about tainted blood and getting out of prison came into evidence through other sources.

Finally, the petitioner contends that the trial court erred in sustaining the prosecutor's objection concerning Pinch's feelings about killing Pachaco after Pinch answered he regretted it, and in not allowing Sherry Olivey to testify (apparently, since the answer is not in the record) about Pinch's feelings of regret over killing both Pachaco and Ausley. However, the evidence that Pinch regretted his actions was before the jury through the testimony of his mother, through his letters, and through the testimony of his sister as well as his testimony prior to the judge's sustaining the objection of the prosecutor. In the charge to the jury, the court specifically instructed the jury that Pinch stated he regretted killing the men (R. 323), that his mother and sister also testified he regretted his acts (R. 324-325), and further charged the jury that if Pinch satisfied the jury he had changed since incarceration and now appreciated the severity and error of his conduct, this could be a circumstances in mitigation (R. 333-334). The defense counsel argued this issue. Thus, this mitigating factor, like the other allegedly improperly excluded evidence, was before the jury.

Since the trial court's rulings in sentencing were proper both as to admission of evidence and as to charging on mitigating circumstances, there is no reason to examine North Carolina's harmless error rules concerning exclusion of evidence and incomplete instructions on mitigating circumstances. As is apparent from the face of this record, even if there is error, it is harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

This Court ought not grant its writ to review this issue on mitigating factors. There was no error of Federal constitutional law in the charge; likewise, there was no clear showing of improper restriction of evidence in mitigation in violation of this Court's ruling in Lockett v. Ohio, supra. There is, therefore, no vital question of Federal law presented for this Court's consideration.

III. THE SUPREME COURT OF NORTH CAROLINA INTERPRETED THE PROVISIONS OF G.S. 15A-2000 AS A MATTER OF STATE LAW AND THIS INTERPRETATION IS NOT REPUGNANT TO CONSTITUTIONAL PRINCIPLES.

The Supreme Court of North Carolina, in State v. Pinch, supra; State v. Smith, 305 N.C. 691, 292 S.E. 2d 264 (1982); and State v. Williams, 305 N.C. 656, 292 S.E. 2d 243 (1982) (all handed down on June 2, 1982) explicitly held what had been previously assumed concerning the proper reading of G.S. 15A-2000.[5] The Court construed the language of G.S. 15A-2000 (b) and (c) to require the trial court to charge the sentencing jury in a first degree murder case that if a jury found beyond a reasonable doubt that (1) one or more statutory aggravating circumstances existed, (2) that these aggravating circumstances were substantial enough to warrant the death penalty and (3) that the aggravating circumstances outweighed the mitigating circumstances, then the jury must recommend a sentence of death.

Pinch had attacked the instructions given by the trial court in his case in the Supreme Court of North Carolina on the basis that the instructions violated his statutory rights under G.S. 15A-2000 and the United States Constitution since

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[5]North Carolina Pattern Instructions, Crim. §150.10 (Replacement, 1980). State v. Barfield, supra; State v. Martin, 303 N.C. 246, 278 S.E. 2d 214, cert. denied ____ U.S. ____, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); State v. Rook, 304 N.C. 201, 283 S.E. 2d 732 (1981), cert. denied ____ U.S. ____, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982).

the instructions "withdrew from the jury its final option to recommend a life sentence notwithstanding its earlier findings." State v. Pinch, supra, 292 S.E. 2d at 227. Now, realizing that a state may constitutionally require a recommendation of death upon the making of certain findings by the sentencer (Jurek v. Texas, supra; Adams v. Texas, supra), Pinch has shifted his ground. Instead of claiming a Federal question is presented because the State's interpretation of the North Carolina death penalty statute is unconstitutional - the claim made below - Pinch now suggests that a Federal question for review exists for this Court because the Supreme Court of North Carolina allegedly misread Furman v. Georgia, 408 U.S. 238 (1972) and its progeny and felt bound, as a matter of Constitutional law, to construe G.S. 15A-2000 to require a death penalty recommendation if all the issues in G.S. 15A-2000(c) are answered affirmatively. If it were true that the Supreme Court of North Carolina had acted as it did solely because it misconstrued this Court's decisions, then a Federal question is presented: United Airlines v. Mahin, 410 U.S. 623 (1973). However, a fair and complete reading of the portions of the Supreme Court of North Carolina's opinions dealing with this issue in State v. Pinch, supra; State v. Smith, supra; and State v. Williams, supra all reveal that the Supreme Court of North Carolina's construction of G.S. 15A-2000 to require a recommendation of death after certain findings are made was not based on a perceived constitutional requirement, but rather on a plain reading of the statute itself.

In State v. Pinch, supra, the case upon which State v. Williams, supra and State v. Smith, supra largely rely, the Court held that the instruction to the jury that they must return a recommendation of death if they found all three

issues submitted to them for consideration was proper, since it was based on the statutory criteria set forth in G.S. 15A-2000(b) and (c). The Court went on to say that the jury could not be allowed to exercise unbridled discretion and disregard the findings it made pursuant to G.S. 15A-2000(c), but rather must exercise guided discretion within the "carefully defined set of statutory criteria" (292 S.E. 2d at 227). The Court then cited State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979) to support the proposition that the jury may not be instructed to "disregard the procedure outlined by the legislature and imposed the sanction of death at their own whim." 298 N.C. at 35, 257 S.E. 2d at 346. (emphasis added).

The North Carolina Supreme Court in Pinch construed G.S. 15A-2000. However, the thrust of the opinion in Pinch was not that the Supreme Court of North Carolina must, for constitutional reasons, construe its death penalty statute as it did, but rather, that the jury should not be allowed in making the sentencing decision to disregard the procedure outlined by the legislature. The Court's decisions in Pinch, Smith, and Williams nowhere state the North Carolina Supreme Court felt compelled by the Federal Constitution to interpret G.S. 15A-2000 as it did, but rather reiterate a plain reading of the statute required the result reached by the Court. In fact, in State v. Pinch, supra, the Court found it necessary to add a footnote citing Jurek v. Texas, supra for the proposition that the Supreme Court of North Carolina's construction of the statute in question is Constitutionally permissible. This alone clearly indicates that the Supreme Court of North Carolina was not interpreting its statute as it did due to some feeling of Federal Constitutional mandate. However, if there is any question as to the basis upon which the majority in the case now before this Court interpreted

the language of G.S. 15A-2000, that question is resolved by referring to the opinions by the North Carolina Supreme Court in State v. Williams, supra and State v. Smith, supra. In State v. Smith, supra the Supreme Court of North Carolina stated the instruction that the jury must return a verdict of death after making certain findings "comports with the procedure contemplated in G.S. 15A-2000(b)." 292 S.E. 2d at 275. In State v. Williams, supra, the Court rejected the argument that the jury despite its findings made pursuant to G.S. 15A-2000(c) ought still be able to return a life sentence if it desired. The Court stated:

> "The defendant argues that even if the jury fails to find sufficient mitigating circumstance(s) which outweigh the aggravating circumstances found, it may still, in its discretion, impose a sentence of life imprisonment. We find no authority for that position in G.S. 15A-2000(c) or elsewhere....G.S. 15A-2000(b) requires the jury to deliberate and render a sentence recommendation 'based upon' two considerations: (1) whether sufficient aggravating circumstances exist and (2) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found. The statute specifically requires that the jury sentence recommendation be 'based on these considerations' - not unbridled discretion. G.S. 15A-2000(b)(3). This specific mandate is clear - it requires no interpretation." 292 S.E. 2d at 263 (emphasis added)

Justice Exum, the lone dissenter in the matter now before the Court as well as in State v. Smith, supra and State v. Williams, supra, argued initially that the majority decided to construe the statute "as it did on the sole ground that otherwise the statute would be subject to constitutional attack." 292 S.E. 2d at 230. However, he then accused the majority of having fallen into the same logical trap in reading G.S. 15A-2000 to which he had previously succumbed when, in State v. Rook, supra he wrote that:

> "the clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances." 304 N.C. at 243, 283 S.E. 2d at 757.

As he proceeded further in the dissent, he argued that the majority in construing the statute based their construction on a misreading of State v. Goodman, supra and then, finally, while admitting under Jurek v. Texas, supra the majority's interpretation of the state statute would pass Constitutional muster, he claimed his new view of how the statute should be read was more solidly supported by the decisions of the United States Supreme Court and is closer to the legislative intent of the North Carolina General Assembly.

While initially accusing the majority of deciding the statute due to a perceived constitutional compulsion, Justice Exum then asserted the majority construed the statute as they did due allegedly to reading the statute incorrectly as he had previously done and misreading state case law. Thus, the vast part of the dissent in Pinch, which Justice Exum adopted in his dissents in Smith and Williams, reaffirms what the majority opinions in Pinch, Smith and Williams clearly show: That the statute in question was construed by the Supreme Court of North Carolina as a matter of state law.

This Court must defer to the interpretation placed on a statute statute by the highest state court where, as here, the interpretation is made solely as a matter of local law: Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965); Scripto v. Carson, 362 U.S. 207 (1960); c.f. Hankerson v. North Carolina, 432 U.S. 233, 244-245 (1977). The North Carolina Supreme Court's interpretation of the statute is not repugnant to Federal Constitutional mandates. Jurek v. Texas, supra. Therefore, this Court ought not issue its writ of certiorari to the Supreme Court of North Carolina since there is no Federal question here presented for review.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that Michael Edward Pinch's petition for writ of certiorari should be denied.

Respectfully submitted, this 5th day of October, 1982.

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CERTIFICATE OF SERVICE

I, Joan Herre Byers, Assistant Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the Attorney of Record of Petitioner Michael Edward Pinch, by depositing same in the United States Mail, first class postage prepaid, and properly addressed as follows:

Mr. Adam Stein
Appellate Defender
Office of the Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602

This the 5th day of October, 1982.

Joan Herre Byers
Assistant Attorney General